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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

***“Carbon Pollution Emission Guidelines for Existing Stationary Sources:
Electric Utility Generating Units”***

79 Fed. Reg. 34830 (June 18, 2014)

Docket ID No. EPA-HQ-OAR-2013-0602

**COMMENTS OF THE GENERAL ASSEMBLY
OF THE STATE OF MISSOURI**

December 1, 2014

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INTRODUCTION

The General Assembly of the State of Missouri respectfully submits its comments on the proposed carbon emission guidelines for existing stationary sources for electric utility generating units ("Proposed Rule").

The General Assembly submits these comments due to its deep concern that the Proposed Rule will overtake and overturn decisions that the General Assembly has made in ensuring that Missouri's energy policy is carefully tailored to the needs and resources of all Missourians. The authority to develop an energy policy for Missouri, along with other legislative functions, is not vested in the U.S. Environmental Protection Agency, but the Missouri General Assembly through Section 1 Article III of the 1945 Constitution of Missouri. The General Assembly is composed of the Missouri Senate, with 34 members, and the Missouri House of Representatives, with 163 members. Collectively, the General Assembly, in coordination with the Governor and State agencies, develops the services and infrastructure that Missourians need to thrive. This includes the sources of energy so that Missourians across the socio-economic spectrum can afford the basic necessities of modern life, including their utility bills. The Proposed Rule improperly invades on the General Assembly's ability to perform these basic state functions, which Missourians have invested in us.

Specifically, EPA's Proposed Rule requires a national reduction of carbon emissions from fossil fuel-fired electric generating units (EGUs) from 2005 levels of more than 20 percent by 2020 and 30 percent by 2030. For Missouri, based on our more recent 2012 levels, this translates into a 21 percent reduction by 2030. This reduction is not a goal, but a requirement. EPA commands our state government to develop policies

that comply with this federal mandate, regardless of the impact on our residents and their communities. While EPA purports to offer the State options for how this goal can be met, these are Hobson's choices at best. If EPA disagrees with choices this duly elected, august body makes for our State, the Proposed Rule says that EPA can set aside these policies and impose its own plan on Missourians.

What's more, EPA commands our State to make these decisions within a 13-month deadline. Establishing energy policy takes into account the needs and resources of communities across our State. It is a complex undertaking involving balancing a multitude of factors, primarily affordability and the ability to produce enough energy to keep our electrical grid stable and reliable. For example, EPA mandates that Missouri make the following fundamental changes to our State energy policy in order to achieve EPA's federal mandate: reduce *all* electricity use by 1.5 percent year over year until demand is reduced by almost 10 percent, increase natural gas combined cycle capacity factors by over 40 percent, increase electricity from renewable energy sources by 300 percent, and gain efficiency at coal-fired units by 6 percent. Changes to our State's energy policy of this enormous magnitude, even if desirable, would take considerable time and planning. Neither the General Assembly nor our state regulators ought to push aside the many important issues Missourians have elected us to handle so that we can marshal our State's resources to meet EPA's onerous and arbitrary deadline.

The General Assembly, after review, finds the Section 111(d) rule will hurt real people in real time and is adverse to human health and welfare. EPA points to California as the example of how a state should manage its energy policy, but California proves our point. Missouri does not want to set itself on a path toward California's economic and

energy hardships resulting directly from that State's policy to shift its energy sources away from coal to predominantly natural gas. In Missouri, more than 80 percent of electricity is generated by coal-fired plants. Coal has literally fueled our way of life. Moving rapidly and without justification away from coal toward unproven or highly variable energy sources, such as natural gas, solar, and wind, will be incredibly costly and result in much higher utility bills, lost jobs and an electric grid that may not stand up to our ongoing energy needs. The regional transmission organization (RTO) that covers portions of Missouri predicts severe grid reliability issues in 2020 and beyond if the plants providing base-load fuel are retired in accordance with the Proposed Rule. The economic burdens of the Proposed Rule thus fall most severely on states like Missouri that rely on coal. Forcing widespread economic harm and job losses in coal-using states and regions of the country will pit them against other states and regions less reliant on coal, discriminating against certain parts of the country to the detriment of others.

Regional imbalance is only one issue rendering the Proposed Rule a quintessential legislative judgment well beyond any federal agency's authority or expertise. The cap-and-trade-like system that the Proposed Rule would mandate requires balancing a multitude of interests well beyond EPA's charge of addressing environmental impacts of specific emissions. Congress, not a federal agency, has the sole power to authorize and debate issues that implicate state's rights, energy planning and policy, and our national interests with respect to other countries. Missouri's U.S. Senator Claire McCaskill stated when she voted against the Waxman-Markey bill, which offered a similar cap-and-trade regime: "We've got to be very careful with what we do.... We need to be a leader in the world, but we don't want to be a sucker.... And if we go too far with this, all we're going

to do is chase more jobs to China and India, where they've been putting up coal-fired plants every 10 minutes." This statement is even more true today.

Not surprisingly, the Proposed Rule and the Waxman-Markey bill both were pushed by California and states that do not generate electricity from coal-fired plants. Such policies are not in the best interests of a majority of states, which is why the Waxman-Markey bill was not passed by Congress several years ago. It is the sense of the General Assembly on the behalf of Missourians that if EPA presented this Proposed Rule to Congress, it too would not pass. The Proposed Rule, therefore, is an improper end-run around the policy-making process. EPA's proposal should be submitted to Congress for its consideration and debate, not unilaterally imposed by an unelected agency.

In addition to the above, the General Assembly makes the following points in these Comments:

- The Proposed Rule's premise and scheme for rationing and reducing existing energy supply undermines the Missouri Public Service Commission's authority to assure reliable and affordable electric power in Missouri, and Missouri's recently enacted energy plan.
- The Proposed Rule violates fundamental principles of federalism guaranteed to Missouri by the United States Constitution, including the Tenth Amendment. The federal government may not require a state to adopt a particular regulatory program or punish it for failing to do so.
- The Proposed Rule has no political accountability. It forces Missouri to carry out a plan over which it has no real control and eliminates any political accountability on the part of EPA. It will be state elected officials, and not

EPA, who will take the blame in the eyes of Missouri consumers for the expenses and impacts of the Proposed Rule.

Any one of these considerations alone would be enough to justify rejection of the Proposed Rule, the combination is overwhelmingly decisive. The economic impacts of the energy regulations threatened by the Proposed Rule are not in the best interests of Missourians, and will improperly handcuff the General Assembly from implementing their collective will. Clean Air Act Section 111(d), as envisioned by Congress, gives states the primary role in determining how to set state standards in accordance with federal guidelines – not mandates. The Proposed Rule does not comply with this approach. The General Assembly has given the Missouri Air Conservation Commission the authority to develop emissions standards and compliance schedules. This legislation provides Missouri the control and flexibility that Missourians need and deserve to prevent federal mandates from driving up prices, costing jobs, and weakening electric grids.

EPA is acting outside the scope of its congressional authority in a way that violates the rights of the states and its citizens. The Proposed Rule must be withdrawn.

DETAILED COMMENTS

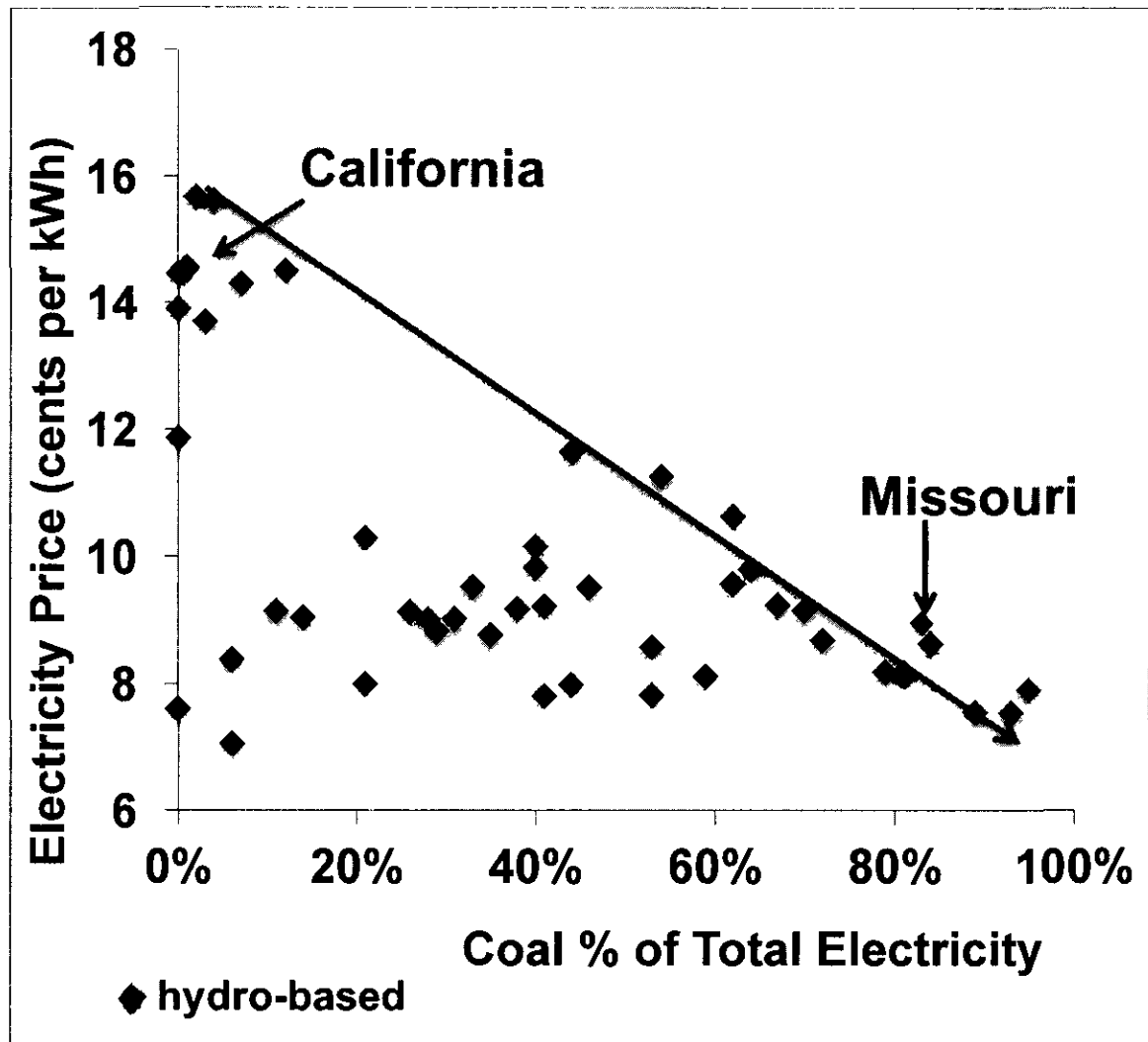
I. As Seen in California, the Proposed Rule Would Have Devastating Impacts on Many Missourians, Especially Those with Low and Fixed Incomes.

The people of Missouri have entrusted us, their elected officials, to preserve, protect and enhance their way of life. Our General Assembly is united around the basic principle that Missouri must not accept any policy that threatens the livelihood or undermines the quality of life of Missourians. EPA's Proposed Rule is such a threat. How do we know? We have seen the disastrous effects of top-down mandates and comparable policies for energy redistribution in California, upon which the Proposed Rule is based. We have studied EPA's "much-heralded" California model¹ and the resulting price impacts and threatened brown-outs. The General Assembly does not want these adverse conditions to be imposed on Missourians. Missouri refuses to become California.

Let's take a closer look at the disastrous impacts of California's energy policy. The center of California's energy policy has been to virtually eliminate coal, which required a move to natural gas as the State's primary source of power. Natural gas prices, though, have averaged almost three times those of coal.² As a result, from 2001-2013, California's industrial electric prices were 65 percent higher than the national average.

¹ In the 128-page Proposed Rule, EPA mentions California 22 times, and three other states are mentioned less than ten times each. Neither Missouri nor any other state that depends significantly on coal is mentioned even once.

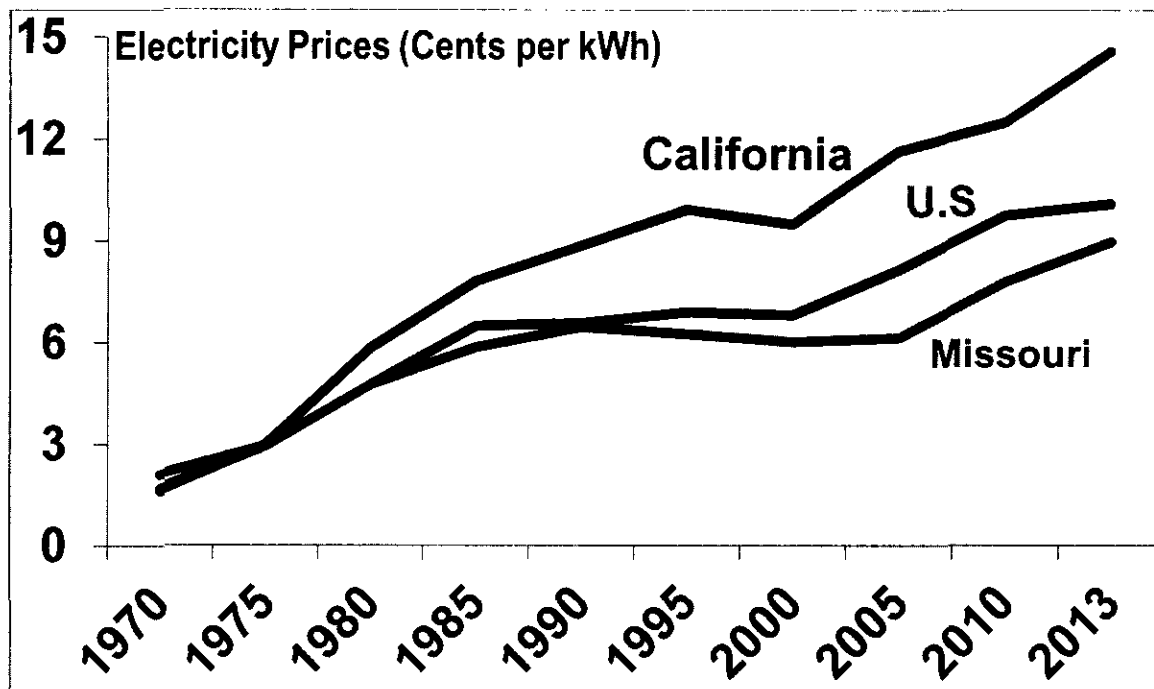
² Energy Information Agency ("EIA"); Los Angeles Times, December 9, 2012, "Rise in renewable energy will require more use of fossil fuels," <http://articles.latimes.com/2012/dec/09/local/la-me-unreliable-power-20121210>.



As a result, every sector of California's economy pays rates substantially higher than the national average. In 2013, California residents and business paid 35 percent and 32 percent higher rates respectively, with industrial rates 67 percent above and overall rates 45 percent above average.³ In Missouri, our rates are lower than average meaning that the gap between California and Missouri is even greater. In 2013, a company based in Missouri would have spent 82 percent more on electricity if it was based in California.⁴

³ EIA, 2013.

⁴ EIA, 2014.



The impact on California jobs has been dramatic. During the period 2001-2013, while its energy costs escalated, California lost 650,000 manufacturing jobs—*approximately one-third of all California manufacturing jobs*.⁵ Most of these jobs were in energy-intensive industries. When these industries left, California's *per capita* electricity use dropped while electricity use nationally increased.⁶ California has been losing companies at a 3:1 ratio; 160 companies left California in just the first five months of 2013.⁷ Some aspects of California's economy, such as tourism, entertainment and Silicon Valley, may keep the state afloat, but the manufacturing sector, which is what many people in the heartland rely on, has been devastated by California's energy policy.

⁵ Bureau of Labor Statistics, "Manufacturing Jobs – California."

⁶ EIA; San Gabriel Valley Tribune, February 22, 2014; Mitchell, et al., "Stabilizing California's Demand," Energy Economics (March 2009).

⁷ Stuart Varney, October 10, 2010, "Companies Bid Farewell to California," Fox Business; Frank Marchant, May 22, 2013, "High Taxes Mean It's Lights Out For California," Money Morning.

The effect of California's high rates and weakening manufacturing economy falls heavily and disproportionately on the working class, particularly those who live in communities off the coast. This creates an ever-growing level of poverty: 34 percent of the nation's welfare recipients live in California.⁸ California has one of the highest levels of income inequality in America,⁹ and has more children in poverty than many states' entire populations. Further, despite California's natural riches and advantages, California had a negative net worth of \$127 billion in 2013, and budget deficits of \$25 billion in 2011 and \$9 billion in 2012.¹⁰ The California experiment has shown the disastrous consequences of abandoning coal as an energy source and pushing jobs for the working class out of its borders, often to Mexico and other countries.

The interior of the United States, with its hot summers, cold winters, and heavy manufacturing, requires much greater electric intensity. Missouri is not California and would be devastated by an EPA dictate that it be California on electric policies. It is crystal clear that if Missouri is forced to adhere to California's energy policies, Missourians will pay substantially higher utility bills. Just look at the numbers. During the first half of 2014, Missouri residents paid 10.22 cents/kWh for electricity¹¹ compared to California's rate of 15.51 cents/kWh – some 50 percent higher. Paying California's rates would have cost Missourians an *extra* \$957,119,700.00.

⁸ Michael Gardner, July 28, 2012, "Is California the Welfare Capital?," U-T San Diego.

⁹ Joel Kotkin, March 20, 2014, "Where Inequality Is Worst In The United States," Forbes.

¹⁰ The Sacramento Bee, March 28, 2013, "State auditor: California's net worth negative \$127.2 billion;" Jim Christie, January 10, 2013, "California Budget Surplus? Governor Introduces Plan That Eliminates Deficit," Reuters.

¹¹ EIA August 2014, at 120 (table 5.4.B), 124 (table 5.6.B).

This exorbitant price hike would be hard on Missourians and on the types of businesses, such as heavy manufacturing, that we rely on to generate our economy. Low electricity prices are vital to the state's ability to attract and maintain businesses and industries.¹² Currently, manufacturing employers in Missouri pay 10 percent less per kilowatt hour for their electricity than the national average. Manufacturing employs more than 250,000 Missourians and makes up nearly 10 percent of the state's employment. Higher electricity rates mean higher prices for products and services, or less money available to hire and retain staff. Indeed, studies have shown that every 10 percent increase in electricity costs decreases the state's gross domestic product by 1 percent.¹³ Missouri's gross domestic (state) product was \$276,345,000,000 in 2013,¹⁴ meaning that just a 10 percent electricity rate hike would cost Missouri \$2.8 billion. The U.S. Chamber of Commerce estimates more than 27,000 job losses and \$3.2 billion decrease in GDP resulting from the Proposed Rule in our region of the country.¹⁵

Thus, the jobs Missourians need to pay for the near billion dollar electricity "tax" the Proposed Rule imposes would start disappearing. For example, Noranda Aluminum, a major employer in southeastern Missouri, has reported that the rise in rates from the Proposed Rule may force it out of business.¹⁶ Also, about 2 percent of Missouri's GDP

¹² Osage Valley Elec. Coop. Assoc., "Missouri Electric Utilities Focus on Customers as They Review EPA's New Greenhouse Gas Regulations for Power Plants," online at <http://www.osagevalley.com/content/news-release-missouri-electric-utilities>.

¹³ Mgmt. Info. Svcs., *The Social Costs of Carbon? No, the Social Benefits of Carbon* 77, Jan. 2014, online at http://www.americaspower.org/sites/default/files/Social_Cost_of_Carbon.pdf.

¹⁴ Missouri Econ. Rsch. and Info. Ctr., Gross Domestic Product Data Series (2013), online at <http://www.missourieconomy.org/indicators/gsp/index.stm> ("MERIC GDP").

¹⁵ *Assessing the Impact of Potential New Carbon Regulations in the United States*, Institute for 21st Century Energy, U.S. Chamber of Commerce (May 2014).

¹⁶ Jo Mannies, "Stakes High For Missouri Electricity Customers In Battle Between Ameren And

comes from utilities, including coal plants.¹⁷ As it is, existing emissions standards have required the shuttering of power plants, which has already decimated entire communities.¹⁸ Adding to this problem is the fact that Missouri is at the crossroads between the South and Midcontinent Independent System Operator (MISO) power regions, which are expected to incur “over half the U.S. total costs during the 2014-30 timeframe,” and “will shoulder more of the economic consequences of compliance.”¹⁹ When large numbers of workers lose their jobs, the impacts are felt by entire communities. Missourians cannot afford for more manufacturing plants to close.

In addition to causing people to lose jobs, sharply increasing electricity rates will severely threaten Missouri’s low- and fixed-income residents.²⁰ Approximately 16 percent of Missourians fall below the poverty line.²¹ In rural Missouri, the poverty rate is 18 percent. For these families, energy prices as a proportion of income are heaviest, and the Proposed Rule will force them to choose between paying their utility bills and

Noranda,” St. Louis Public Radio (Jun. 8, 2014), online at <http://news.stlpublicradio.org/post/stakes-high-missouri-electricity-customers-battle-between-ameren-and-noranda>.

¹⁷ Missouri Econ. Rsch. and Info. Ctr., Gross Domestic Product Data Series (2013), online at <http://www.missourieconomy.org/indicators/gsp/index.stm> (“MERIC GDP”).

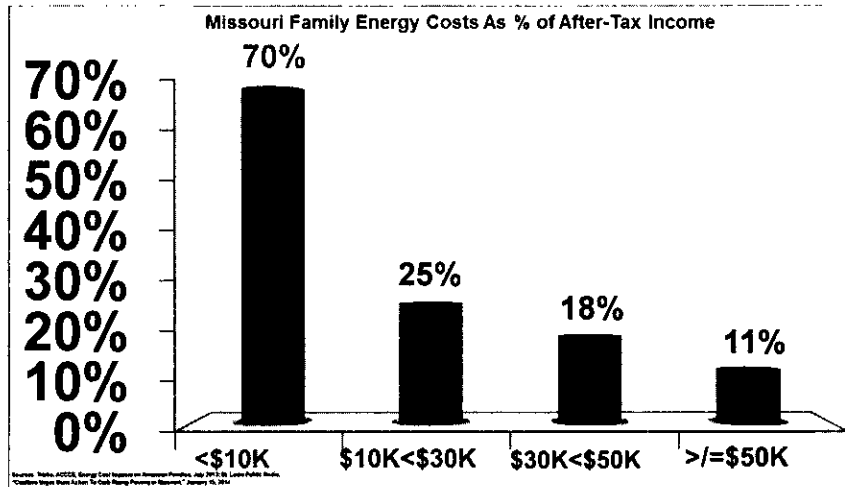
¹⁸ Assoc. Press., “Ameren Blames EPA Standards for Coal Plant Closure, Nixon Signs Bill to Allow Less Restrictions,” *KBIA.org*, (July 8, 2014), online at <http://kbia.org/post/ameren-blames-epa-standards-coal-plant-closure-nixon-signs-bill-allow-less-restrictions>; Gloria Lloyd, “Ameren Studying Impact of New Emissions Standards On Oakville Plants,” *The Call* (June 18, 2014), online at <http://www.callnewspapers.com/Articles-Impact-News-i-2014-06-18-273291.112112-Ameren-studying-impact-of-new-emissions-standards-on-Oakville-plant.html>. Governor Nixon’s plan to permit fewer restrictions on emissions may fail because of the Proposed Rule. *See infra* (discussing commandeering and lack of real option to opt out of federal regulation).

¹⁹ *Assessing the Impact of Potential New Carbon Regulations in the United States*, Institute for 21st Century Energy, U.S. Chamber of Commerce at 5 (May 2014).

²⁰ Dierdre Shesgreen, “Will Coal Plans Hurt Missouri?,” *News-Leader.com* (July 14, 2013), online at <http://archive.news-leader.com/interactive/article/20130714/NEWS01/307140011/Will-coal-plans-hurt-Missouri->.

²¹ U.S. Census, State & County QuickFacts: Missouri (2013), online at <http://quickfacts.census.gov/qfd/states/29000.html> (“Census 2013”).

affording other staples for modern life.



Government assistance programs are not the answer. 145,279 households in Missouri received Low Income Home Energy Assistance Program (LIHEAP) funds in 2013 (6 percent of the total households in Missouri); in 2014 those funds will total \$70,882,484.²² This number, though, significantly undercounts the number of households *eligible* for LIHEAP. Undoubtedly, as energy prices rise due to the Proposed Rule, more people will need LIHEAP.²³ There is no way to offset these higher utility costs for vulnerable families. The better choice is not to force these higher costs in the first place.

In all of its talk about modeling a national system after California, why doesn't EPA address impacts on the impoverished or the sustained destruction of California's manufacturing economy? Missouri cannot afford to become another California – nor should EPA force our citizens to pay California utility rates.

Unlike California, the Missouri General Assembly has carefully and responsibly

²² Campaign for Home Energy Assistance, "Missouri" (2014), online at <http://liheap.org/states/mo/> ("CEA"); U.S. Census, State & County QuickFacts: Missouri, *supra* (giving total number of households as 2,358,270).

²³ CEA, *supra*.

managed Missouri's energy policy. Our highest priority has been and continues to be assuring that electricity is broadly available and affordable, while at the same time produced in environmentally appropriate ways. Right now, we are achieving these goals. This is due, in large part, to the State's reliance on coal, which is locally abundant and inexpensive. In 2013, coal supplied 83 percent of Missouri's net electricity generation.²⁴ It is the only base-load fuel that meets all of the criteria outlined by our Governor in his order for a statewide energy plan.²⁵ Coal is --

1. Clean. Since 1970, coal generation in this country has tripled, but regulated emissions have decreased more than 90 percent. The State continues to work with utilities on creating more efficient, cleaner burning coal-fired technology.
2. Reliable. Coal has provided more than 75 percent of Missouri's electric power for decades because it is a highly stable, reliable base-load fuel. This winter, when Missourians experienced the "Polar Vortex," coal fired-plants were the only sources of energy with the capacity to meet the high demand.
3. Affordable. Since 2000, the cost to produce electric power from coal has been one third of the cost to produce natural gas. The relative affordability of coal is the primary reason Missourians are accustomed to comparatively low energy rates.
4. Abundant. The U.S. has 27 percent of the world's coal securely located within its borders. Much of this coal is located in the Midwest, making it an abundant local source of energy for the vast majority of states in the middle of the country.
5. Predictable. Coal has the most stable pricing and output of any fuel. Natural gas,

²⁴ U.S. Energy Administration, Missouri State Profile, available at <http://www.eia.gov/state/?sid=MO> (last visited Oct. 27, 2014).

²⁵ Exec. Order 14-06, at 1-2.

historically, has had the greatest price volatility of any fuel, and renewable energy sources, such as wind and solar, are not reliable enough to be base-load fuels.

6. Sustainable. Contemporaneous land restoration ensures that active areas for mining operations remain small and are left in conditions that benefit local mining communities. Also, carbon capture and other clean coal technologies continue to be developed and U.S. should lead the world in their continued development.
7. Long-term resource. The U.S. has hundreds of years of coal in its mines and has the ability to advance clean coal technologies toward near-zero emissions.

Through smart, innovative methods for extracting, shipping, and using coal, including several forms of emissions-reducing technology, Missouri has maintained affordable energy prices – unlike nearly every state that has attempted to forsake coal use. Specifically, Missouri’s 2.4 million households spend an average of \$1,300 annually on electricity, 13 percent less per kWh than the national average. The future is brighter in Missouri without the Proposed Rule, as Missouri’s strategic investments in coal-fueled electricity pay economic and environmental dividends.

For example, Kansas City Power & Light recently completed the state-of-the-art Iatan II plant, which is Missouri’s largest coal-fueled power station. It deploys advanced high-efficiency technology and was one of the largest construction projects in state history, creating nearly 4,000 jobs and \$500 million in salaries and wages. Similar examples in other states, such as the Meredosia plant (a first-of-its-kind, near-zero emissions plant) and the Prairie States plant in Illinois, show that coal can be used as fuel with up to 90 percent capture of CO₂— resulting in a CO₂ emission rate lower than natural gas combined cycle plants. As plants like these are built, emissions will continue

to decline – all while preserving the livelihoods of Missourians throughout the State.

II. The Proposed Rule Would Interfere with Missouri's Ability to Ensure Reliable, Affordable Electricity for Missourians.

The Proposed Rule interferes with the authority of Missouri's government to ensure that consumers and businesses have reliable, affordable electricity. The Rule violates both Missouri state law and federalism principles guaranteed to Missouri under the Constitution of the United States.

A. The Proposed Rule Would Improperly Tie the Hands of Missouri's Public Service Commission from Managing the State's Electricity Grid.

Missouri public utility commissioners have already voiced their concern about the ability of utilities to maintain the reliability of their power grids if the Proposed Rule goes into effect.²⁶ These concerns are well founded, as the Proposed Rule undercuts their ability to make decisions that are in the best interests of Missourians.

In Missouri, the Public Service Commission ("PSC") is charged with balancing the multitude of sometimes competing interests to provide Missourians with safe, reliable power at rates that are affordable for the population as a whole. By charter, cost and reliability are the most important factors. Commission Rule 4 CSR 240-22.010 states that the PSC's mission is to "provide the public with energy services that are *safe, reliable, and efficient, at just and reasonable rates*, in compliance with all legal mandates, and in a manner that serves the public interest and is consistent with state

²⁶ "State Perspectives: Questions Concerning EPA's Proposed Clean Power Plan," Hearing, Cmte. on Energy and Commerce, Subcmte. on Energy and Power, at 47 17-18, 21-23, 32, 45-46 (Sep. 9, 2014) ("State H. Hrg.") (prelim. transcript online at <http://docs.house.gov/meetings/IF/IF03/20140909/102623/HHRG-113-IF03-Transcript-20140909.pdf>). See also State H. Hrg. at 95-96 (confirming that all state commissioners were forecasting reliability problems).

energy and environmental policies.²⁷ Further, the PSC's resource planning process puts "minimization of the present worth of long-run utility costs as the primary selection criterion in choosing the preferred resource plan."²⁸

The Proposed Rule contradicts the PSC's mandate by seemingly disallowing considerations of cost and reliability. The Proposed Rule also contravenes the Commission's resource planning authority. First, by setting emission rate limits that can be achieved only through aggressive outside-the-fence measures, EPA is attempting to substitute its judgment for that of our State's PSC, utilities, grid operators, and other Missouri decision-makers with respect to allowable amounts of electricity from coal, natural gas, nuclear, and renewables. Second, EPA is presuming how much electricity Missourians should use. This is the job we have delegated to the PSC.

A FERC commissioner already has forecasted a "jurisdictional train wreck"²⁹ between his agency and the EPA over how to route electricity; we can foresee the same problems between Missouri PSC and EPA. If EPA requires transmission utilities to dispatch electricity to draw from "greener" energy sources instead of the most cost-effective--for example, favoring drawing power from wind plants instead of coal plants--EPA would infringe on the authority of energy regulators at all levels.³⁰ In this regard, the Proposed Rule would deprive the Missouri PSC of its ability to maintain constant and

²⁷ See Commission Rule 4 CSR 240-22.010(2) (emphasis added).

²⁸ See Commission Rule 4 CSR 240-22.010(2)(B) and (C).

²⁹ Tony Clark (FERC Commissioner), "FERC Perspectives: Questions Concerning EPA's Proposed Clean Power Plan and Other Grid Reliability Challenges," Hearing, Cmte. on Energy and Commerce, Subcmte. on Energy and Power, at 47 (Jul. 29, 2014) ("FERC H. Hrg.") (prelim. transcript online at <http://energycommerce.house.gov/hearing/ferc-perspectives-questions-concerning-epa%27s-proposed-clean-power-plan-and-other-grid>).

³⁰ *Id.*

reliable electricity supply at the times it is most needed.

This problem of grid integrity, even without the Proposed Rule, has been a growing concern. “Many of the coal-based power plants that operated during the coldest days of this past winter are slated to close in the next few years.”³¹ The Proposed Rule will make this problem worse. PJM Interconnection, the electrical grid operator serving the Northeast, noted that an “unprecedented” number of coal units are retiring, and natural gas pipelines are not yet ready to make up the difference--just in time for winter, when cold can cause spikes in natural gas prices.³² The same is true in the Midwest and South, which are the regional electrical grids covering Missouri. These grids are predicting a 2.3 gigawatt shortfall in 2016.³³ Unless that capacity can be replaced *in the short term*--two years, long before new plants or technologies can be built--Missouri faces the “real and persistent threat” of ongoing blackouts.³⁴

The real-life consequences of the Proposed Rule can be seen from how states were able to meet the high electricity needs from last year’s polar vortex. A letter from 18 current and former state utility commissioners noted that it was coal-fired power plants that saved the Northeast, Midwest and South from potentially life-threatening blackouts

³¹ *Id.*

³² Matthew L. Wald, “Coal to the Rescue, But Maybe Not Next Winter,” *New York Times* (Mar. 10, 2014), online at <http://www.nytimes.com/2014/03/11/business/energy-environment/coal-to-the-rescue-this-time.html>.

³³ *Id.*

³⁴ The threat of blackouts and weakened electrical grids is not limited to the Midwest and South. The power commissioner from Montana testified to Congress that “[n]o reliability analysis of the EPA’s proposed best system of emission reduction has been conducted for the western interconnection which encompasses 11 states spanning from California to Montana.” Travis Kavulla (Montana Comm’r), State H. Hrg. at 45-46. The Proposed Rules threaten the integrity of the electrical grid nationwide.

during the coldest parts of the winter.³⁵ During the Polar Vortex in the winter of 2013-14, only these plants had the ability to ramp up quickly to meet the sudden, unexpected spike in consumer demand. By forcing these plants off-line, the Proposed Rule could lead to dire consequences for many families should electrical blackouts occur when temperatures drop again to dangerous levels and the grid is needed most.

The fact of the matter is that it already is difficult to maintain a stable supply of electricity given the predicted closures of coal-fired plants. If the Proposed Rule goes into effect, the problem will get much worse, and likely reach crisis levels. Whereas now, we have been able to manage these events, as with the Polar Vortex, the Proposed Rule will handcuff the PSC's ability to effectively respond to these situations in the future.

B. The Proposed Rule Ignores Missouri's Existing Regulatory Scheme and Would Unlawfully Expand EPA Authority Into State Energy Policy.

Section 111(d) does not authorize EPA to impose its standards and compliance schedules on the States; it gives states the authority to develop such regulations. Earlier this year, the Missouri General Assembly and the Governor did this by enacting House Bill 1631 (HB 1631, codified at Section 643.640 of Missouri Revised Statutes). This bill, which was passed in the last legislative session and signed by Governor Nixon on July 7, 2014, requires the Missouri Air Conservation Commission (MACC) of the Department of Natural Resources (DNR) – not EPA – to set Missouri's carbon standard. To assure that the resulting emission standards make sense for Missouri and best balances their needs, we instructed MACC to set standards based on an inside-the-fence analysis of what is feasible at each EGU, and allow for a more lenient standard on a case-by-case basis after

³⁵ Press Release, "Former and Current State Regulators Express Concerns Over the EPA's Proposed Carbon Rules for Power Plants," at 1-2 (Sep. 17, 2014), online at http://www.nma.org/pdf/tmp/state_regulator_statement.pdf.

considering factors such as cost and impacts on ratepayers and the economy.

Specifically, we gave MACC the legal authority to “develop emission standards under [Section 111(d)] through a unit-by-unit analysis of each existing affected source of carbon dioxide within the state.” In doing so, MACC “shall consider,” among other factors, the remaining useful life of the existing affected source, and the overall economic impact from any and all emission standards and compliance schedules developed and implemented under Section 111(d). Importantly, we also gave MACC the explicit authority in HB 1631 to develop less stringent emission standards and longer compliance schedules than those required by federal regulations based on these key factors:

- (1) *Unreasonable cost* due to plant age, location, or basic process design;
- (2) *Physical impossibility* of installing necessary control equipment; or
- (3) *Factors specific to the existing affected source* or class of such sources that make a less stringent standard or compliance schedule more reasonable, including:
 - absolute cost of the emission standard or compliance schedule;
 - economic impact of closing the affected source, including job losses if the source is unable to comply with the performance standard; and
 - customer impacts of the emission standard and compliance schedule, including disproportionate rate impacts on low income populations.

HB 1631 fits entirely within the considerations allowed under in Section 111(d)'s federal implementing regulations at 40 C.F.R. § 60.24(f), which provides that “States may provide for the application of less stringent emissions standards or longer compliance schedules than those otherwise required” by EPA.

By contrast, EPA's Proposed Rule refuses to allow Missouri or any State a role in

setting the standard, or any flexibility or exceptions based on cost, engineering or economic factors. The Proposed Rule provides no allowance for states to have a role in setting the carbon standard and no flexibility for a less-stringent standard or longer compliance timeline based on cost, reliability, or impact on ratepayers or the economy. Indeed, EPA specifically rejected the case-by-case exceptions described in the federal implementing guidelines (40 C.F.R. § 60.24(f)) in its proposed rule:

EPA therefore proposes that the remaining useful life of affected EGUs, and the other facility-specific factors identified in the existing implementing regulations, should not be considered as a basis for adjusting a state emission performance goal or for relieving a state of its obligation to develop and submit an approvable plan that achieves that goal on time.³⁶

It also does not allow for deviations from its carbon reduction mandate by analyzing what is achievable “inside the fence,” *i.e.*, at the source. If Missouri cannot achieve EPA’s mandated carbon reduction inside the fence (which it cannot), the Proposed Rule seeks to require Missouri to look outside the fence or do “whatever it takes” — regardless of cost or reliability issues — to meet the standard. But, Missouri’s state regulatory statutes and programs do not allow Missouri to implement the rule in a way that draws on the assumed outside-the-fence activities considered by EPA. The Proposed Rule, therefore, requires Missouri to enact new legislation that allocates new authority for the State government to implement carbon-driven resource planning and “correction” authority over entities that in many cases have never been subject to such dictates in Missouri. We would then have to design an enforcement scheme as well — all within a little over a year.

³⁶ Proposed Rule at 34926.

This unacceptably intrudes on state sovereignty as recognized under Section 111(d).

The states are to have primacy for determining its allocation of energy resources and methods of compliance under Section 111(d). Missouri has enacted legislation to assure that we meet this obligation in ways that are best for Missourians. The Proposed Rule violates Section 111(d) by trying to take this authority away from the States.

C. The Proposed Rule Is an Unconstitutional Intrusion Into State Authority.

In reality, EPA has made all of the decisions for Missouri. EPA has already arrogated the authority to determine by itself the “best system of emission reduction” (“BSER”).³⁷ EPA also determines the “state goal” for emissions, the target Missouri and other states must meet.³⁸ While Missouri may comment on the proposed BSER, methodology for computing state goals, and underlying data, the resulting BSER and state goal will be set in the final rule and will not be changed.³⁹

The state choices under the Proposed Rule are entirely illusory. Missouri may convert the EPA-set state goal into a rate- or mass-based goal,⁴⁰ but cannot change the number. Missouri has leeway to “assign[] the emission performance obligations to its affected EGUs,” but only “as long as, again, the required emission performance level is met.”⁴¹ All key decisions have been made by EPA.⁴² Further, the option to decline to participate by not formulating a state plan is not truly available under the Clean Air Act

³⁷ See 40 Fed. Reg. 53340, 53346 (Nov. 17, 1975). EPA refuses to reopen that rulemaking. 79 Fed. Reg. at 34852 n.86.

³⁸ 79 Fed. Reg. at 34853.

³⁹ 79 Fed. Reg. 34898 & n.268.

⁴⁰ 79 Fed. Reg. at 34837.

⁴¹ 79 Fed. Reg. at 34853.

⁴² See *FERC*, 456 U.S. at 761 (“having the power to make decisions and to set policy is what gives the State its sovereign nature”).

and is limited even further by the Proposed Rule. If Missouri does not create a state implementation plan that meets with EPA's approval, EPA would mandate a federal plan and could sanction Missouri if its citizens fail to meet the federal standards.⁴³

The state power commissioner from Montana put the problem starkly: "The much heralded flexibility that the proposed EPA rule provides to states is a meaningless concept if the underlying goal, a number which is inflexible, has been calculated using generic assumptions that are misleading or false when applied to the facts of a specific state in the specific part of the transmission grid."⁴⁴

By controlling Missouri's statewide goal and the BSER determination, EPA attempts to dictate the power source mix that Missouri will have to implement to meet the goal, which would leave EPA, not Missouri, in control over Missouri's significant policy choices. The result is a commandeering of Missouri legislative authority in exactly the manner the Supreme Court has held unconstitutional. The Supreme Court "never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations."⁴⁵ And the Court has made clear that "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."⁴⁶ "It is no more compatible with this independence and autonomy that their officers be 'dragooned' ... into administering federal law, than it

⁴³ See 42 U.S.C. §§ 7410(m) (permitting the Administrator to impose sanctions for violations of "any plan"), 7509(a) (listing sanctions Administrator may impose against the state for nonattainment under "any implementation plan").

⁴⁴ Travis Kavulla (Montana Commissioner), "State Perspectives: Questions Concerning EPA's Proposed Clean Power Plan," Hearing, Cmte. on Energy and Commerce, Subcmte. on Energy and Power, at 49 (Sep. 9, 2014) ("State H. Hrg.") (prelim. transcript online at <http://docs.house.gov/meetings/IF/IF03/20140909/102623/HHRG-113-IF03-Transcript-20140909.pdf>).

⁴⁵ *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982).

⁴⁶ *Printz*, 521 U.S. at 929.

would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.”⁴⁷

One concern the Supreme Court has highlighted is the risk that state governments will be blamed by their citizens for regulatory choices made by the federal government. “[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”⁴⁸ The Proposed Rule seeks to do precisely what the Supreme Court found to be off-limits: force Missouri to carry out a plan over which it has no real control and eliminates any political accountability on the part of EPA.

When the Proposed Rule results in unaffordable and unreliable electricity in Missouri, it will be state officials, and not EPA, who will take the blame. All of the significant policy decisions have already been made by EPA, leaving Missouri little if any leeway, even to tinker around the edges. If Missouri refuses to participate, the Proposed Rule will abrogate its sovereignty and impose federal control. Ultimately, Missouri can have any program it wishes -- as long as it's EPA's. Such “freedom” is illusory and inconsistent with fundamental principles of federalism.

CONCLUSION

EPA has adopted the California approach to energy and electricity. California

⁴⁷ *Id.* at 930.

⁴⁸ *New York*, 505 U.S. at 169.

proves that high electric prices and scarcity of electricity are adverse to human health and welfare. The General Assembly will not go down the California path. Electricity, like air, food and water, is one of life's necessities. By requiring the States of the United States to adopt the California model, the Federal Government, under the mandates in this Proposed Rule, would make electricity scarce and expensive and require the people of Missouri and the United States to use less and pay more. The EPA mandates are bad for people and violate the laws of the United States and the Constitution. The Proposed Rule should be withdrawn.